

## **DISCLAIMER**

*This electronic version of an SCC order is for informational purposes only and is not an official document of the Commission. An official copy may be obtained from the [Clerk of the Commission, Document Control Center](#).*

## **PETITION OF**

**MARK E. DECOT**

**CASE NO. PUC-2001-00217**

**Complaint against Williams  
Communications, Inc.**

## **REPORT OF HOWARD P. ANDERSON, JR., HEARING EXAMINER**

**May 15, 2002**

On October 29, 2001, Mark E. Decot ("Petitioner") filed a Petition of Complaint ("Complaint") against Williams Communications, Inc., formerly known as Vyvx, Inc. ("WCI" or "Defendant"), with the State Corporation Commission ("Commission") requesting that the Commission initiate proceedings in accordance with 5 VAC 5-20-90 of the Commission's Rules of Practice and Procedure ("Rules") and issue a rule to show cause for a formal investigation of WCI. Specifically, Petitioner alleges that WCI has failed to remedy damages to Petitioner and other landowners as a result of its installation of telephone cables across Petitioner's property in Orange County, Virginia.

On February 11, 2002, the Commission entered an Order docketing this Complaint as a formal proceeding under 5 VAC 5-20-100 B of the Rules and made WCI a defendant in this case. The Commission directed WCI to file a response to Petitioner's Complaint within twenty-one (21) days of service or no later than March 11, 2002.

On March 11, 2002, WCI filed its Response and Motion to Dismiss wherein WCI argued the Complaint is barred by the doctrine of *res judicata* and should be dismissed because it does not satisfy the requirements of Rule 5 VAC 5-20-100 B. In support of its Motion to Dismiss ("Motion"), WCI states that the Commission's Order of October 8, 1998, in Case No. PUC970047, resolved all the matters raised in the Complaint. Further, WCI argues the Circuit Court of Fairfax County resolved all issues pertaining to alleged actual fraud, constructive fraud, breach of easement agreement, abuse of process, malicious prosecution, negligence, and trespass related to the fiber optic line installed on Petitioner's property.<sup>1</sup> Finally, WCI argues it provides only interstate services through its facilities in Virginia. It holds no certificate issued by the Commission and is, therefore, not subject to regulation by this Commission.

On March 27, 2002, Petitioner filed a Reply to Defendant's Response and Motion to Dismiss ("Reply"). In his Reply, Petitioner argues that the doctrine of *res judicata* is not a bar to the current Complaint because the parties and matters now before the Commission are distinguishable from those in the previous proceeding (Case No. PUC970047). Further, Petitioner argues the Complaint satisfies the requirements of Rule 5 VAC 5-20-100 B. Petitioner claims that

---

<sup>1</sup>Final Judgment Order of the Circuit Court of Fairfax County entered on June 8, 2001. A copy is attached as Appendix A to this Report.

WCI does provide intrastate services and federal authority does not preempt state authority or the obligation of carriers to comply with state law.

Petitioner states he has been unable to resolve damages that he continues to suffer as a result of defendant's activities that began in 1997. Petitioner lives in Fairfax County, Virginia, but owns property in Orange County, Virginia. In October of 1997, VYVX of Virginia, Inc. ("Vyvx") filed a Petition for Condemnation in the Orange County Circuit Court<sup>2</sup> requesting an easement across Petitioner's land to construct an underground communications cable. Petitioner states that he entered into an easement agreement with Vyvx on November 21, 1997, as a result of false representations made by Vyvx. Mr. Decot apparently received two sight drafts from Vyvx dated November 21, 1997, in the amounts of \$7,500.00 (damage release)<sup>3</sup> and \$2,700.00 (right-of-way purchase). The following events took place at the Commission in 1997 and 1998 involving this matter:

1. On April 23, 1997, Vyvx of Virginia, Inc. ("Vyvx"), a wholly owned subsidiary of the Defendant, filed an application with the Commission for a certificate of public convenience and necessity to construct facilities to be used to provide intrastate interLATA telecommunications services.<sup>4</sup>
2. On September 23, 1997, the Commission entered an Order directing Vyvx to respond to complaints that had been made against its application.
3. On November 25, 1997, the Commission ordered Vyvx to cease acquisition of property or rights therein by exercise of, or by implying its right to exercise, the power of eminent domain.
4. On January 14, 1998, the Commission granted Vyvx a certificate to provide interexchange telecommunications services. The Order further advised Vyvx that the facilities construction application would be addressed separately.
5. On October 8, 1998, the Commission denied Vyvx's application for a certificate of public convenience and necessity to construct telecommunications facilities in Virginia, found that Vyvx had refused to obey previous Commission Orders, and imposed a fine on Vyvx for the violations.<sup>5</sup>

Mr. Decot argues the Commission Order of October 8, 1998, applies to Vyvx and not WCI.

Mr. Decot filed a suit for damages against Williams Communications of Virginia, Inc. f/k/a VYVX of Virginia, Inc. and Williams Communications Inc. On June 8, 2001, the Circuit Court of Fairfax County entered an order finding for defendant WCI on all counts except negligence and

---

<sup>2</sup>Case No. CL97000081; Notice of Petition dated September 23, 1997.

<sup>3</sup>The damage release signed by Mr. Decot releases Vyvx from any claims arising out of Vyvx's entry on October 9, 1997, onto Mr. Decot's property located in Orange County, Virginia.

<sup>4</sup>VYVX of Virginia, Inc. *For a certificate of public convenience and necessity to provide interexchange telecommunications services and to have its rates determined competitively*, Case No. PUC970047, 1998 S.C.C. Ann. Rep. 221.

<sup>5</sup>The Commission imposed a fine of \$197,000, but suspended \$175,000 on the condition that Vyvx not violate any order or rule of the Commission or any statutes of the Commonwealth of Virginia for a period of 5 years.

breach of contract “both arising out of the construction work performed on Mr. Decot’s property” and awarded compensatory damages of \$13,500. On December 27, 2001, the Virginia Supreme Court (“Supreme Court”) denied Mr. Decot’s Petition for Appeal from the decision of the Fairfax County Circuit Court.<sup>6</sup> On March 1, 2002, the Supreme Court denied Mr. Decot’s Petition for Rehearing on the Court’s Order of December 27, 2001.

In his pleading of October 15, 2001, Mr. Decot poses three questions for the Commission:

1. Did WCI activities violate Mr. Decot’s civil rights and the civil rights of all Virginia citizens by denying the public an opportunity to participate in a public hearing and decision as prescribed by Title 56, Section 265.2 of the Code of Virginia, as to whether or not WCI should be granted a construction certificate for its new facilities and the right to use eminent domain in Virginia?
2. Does federal authority, pursuant to 47 CFR Section 63.07, that is automatically granted to Vyvx, Inc., WCI, and other common carriers, exempt WCI or its affiliates from the requirement to comply with Title 56 of the Virginia Code when they are proposing to construct new facilities for use in intrastate and interstate communications across Virginia?
3. Did WCI exercise its public duty “in good faith” when it participated with its affiliate Vyvx and WCI’s legal counsel to intentionally abandon its public duty by misrepresenting material facts to him, the Commission, the public, and the Circuit Court of Orange County?

Further, in his pleading of October 15, 2001, Mr. Decot sets forth his Request for Relief, stating that an equitable remedy for him would cause WCI to:

1. Compensate him for all costs he has incurred in an effort to protect his rights and property;
2. Immediately remove its illegally constructed facilities from his property;
3. Compensate him to return his property to the same condition as it was prior to the intrusion in 1997; and
4. Apologize publicly, accepting the burden of fines and penalties that the Commission deems appropriate.

I find Mr. Decot’s Complaint should be dismissed for several reasons. First, this matter has been addressed by the Commission, the Circuit Court of Fairfax County, and the Virginia Supreme

---

<sup>6</sup>Attachment B, WCI Response and Motion to Dismiss dated March 11, 2002.

Court. Unquestionably, the doctrine of *res judicata* applies<sup>7</sup>, whether the Complaint is against Vyvx or its successor, WCI.<sup>8</sup> Second, the Commission does not have the authority to grant the relief requested by Mr. Decot. Apparently, Mr. Decot is not satisfied with the amount of damages recovered in the Fairfax County action. Simply put, the Commission does not have the authority to award damages. Further, the Commission has addressed the events complained of by Mr. Decot in Case No. PUC970047. The three questions Mr. Decot posed for the Commission in his pleading of October 15, 2001, are moot in light of the finding that this Complaint should be dismissed.

Finally, WCI raises the issue of whether Mr. Decot has satisfied the requirement of Rule 5 VAC 5-20-100 B that the parties be identified. Mr. Decot filed the Complaint on his own behalf and on the behalf of other unidentified landowners. Although Mr. Decot is sufficiently identified, the other landowners are not; therefore, the Complaint could not be deemed valid as to their interests.

I find the Motion to Dismiss filed by WCI should be granted. Accordingly, ***I RECOMMEND*** the Commission enter an order that:

1. ***ADOPTS*** this finding; and
2. ***DISMISSES*** this case from the Commission's docket.

### **COMMENTS**

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and 5 VAC 5-20-120 C) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within twenty-one (21) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

---

Howard P. Anderson, Jr.  
Hearing Examiner

---

<sup>7</sup>A test for determining the identity of issues involved in former and subsequent actions is whether the same evidence would support both actions. *Pickeral v. Federal Land Bank*, 177 Va. 743 (1941). Further, the Virginia Supreme Court held in *Flora, Flora & Montague, Inc. v. Saunders*, 235 Va. 306, 311 (1988) that it is immaterial that the full extent of the contractual obligations was not litigated and determined in the first suit; the *res judicata* bar extends to every other matter which the parties might have litigated. Here, Mr. Decot offers no new evidence but bases his Complaint on the same events that occurred in 1997.

<sup>8</sup>A party to the present suit, to be barred by the doctrine of collateral estoppel, must have been a party to the prior litigation or represented by another so identified in interest with him that he represents the same legal right. *Dotson v. Harman*, 232 Va. 402 (1986); *Mowry v. City of Virginia Beach*, 198 Va. 205, 211 (1956). Here, WCI is the successor in interest to Vyvx.